IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.Appeal No.473 of 2005

Judgment reserved on:14.09.2006.

Decided on: September 21, 2006.

Rakesh Kumar **…Appellant.**

VERSUS

State of Himachal Pradesh **….Respondent.**

Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Mr.Lalit Sharma, Advocate.**

For the respondent: **Mr.Ashutosh Burathoki, Additional Advocate General.**

Deepak Gupta, Judge

This appeal by the accused is directed against the judgment of the Sessions Judge / Special Judge, Solan dated 30.9.2005 whereby he has convicted the accused of the offences punishable under Section 376 read with Section 506 I.P.C. and sentenced him to undergo rigorous imprisonment for four years and to pay fine of Rs.10,000/- under Section 376 I.P.C. and to undergo simple imprisonment for one year and to pay fine of Rs.1000/- under Section 506 I.P.C.

2. The prosecution case is that on 1.9.2002 the prosecutrix had taken her cattle for grazing in a forest behind her house. The accused who was known to the prosecutrix having studied in the same school came there and asked her to accompany him to the bushes

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Whether the reporters of the local papers may be allowed to see the judgment? Yes

below the road. On her refusal he picked up the prosecutrix, gagged her mouth, took her to the bushes and after laying her on the ground opened the ***Nara*** of her ***Salwar*** and then raped her. When she tried to raise an alarm, he gagged her mouth and after raping her he threatened her that in case she disclosed the incident to anyone he would kill her. The prosecutrix thereafter collected her cattle and came to her house and narrated the entire incident to her mother. The mother in turn told her own mother (maternal grand mother of the prosecutrix) about the incident. Be it stated that the father of the prosecutrix is dead. The grand mother of the prosecutrix then disclosed the incident to her husband i.e. maternal grand father of the prosecutrix. Next day the grand father of the prosecutrix along with another son-in-law and the prosecutrix went to the Police Station where the statement of the prosecutrix was recorded and F.I.R. Ext.PA was lodged. The prosecutrix thereafter was sent for medical examination. Since the prosecutrix belongs to a Scheduled Caste, case under Section 376 read with Section 506 I.P.C. and under Section 3 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 was registered against the accused.

3. The accused allegedly absconded and came to be arrested only on 22.2.2005. The prosecution examined a number of witnesses. Though the case of the prosecution was that the prosecutrix was only 14 ½ years old the Sessions Court came to the conclusion that the prosecution has failed to prove that she was below 16 years at the time of incident. It, however, held that the accused had committed sexual intercourse with the prosecutrix against her will and without her consent and had also threatened and criminally intimidated the prosecutrix and convicted and sentenced the accused as mentioned above. It, however, acquitted the accused of the charges

under Section 3 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989. Hence, the present appeal.

4. Shri Lalit Sharma, learned counsel for the appellant / accused, contends that the prosecution has failed to prove that the appellant had committed sexual intercourse with the prosecutrix. Alternatively he submits that from the evidence on record it is clear that the prosecutrix was a consenting party to the sexual act and no case of rape is made out.

5. On the other hand, Shri Burathoki, learned Additional Advocate General, has supported the judgment of the trial Court and submits that it is a clear case of rape. He also submits that the trial Court has erred in holding that the prosecutrix was not below the age of 16 years at the time of incident.

6. Two questions arise for decision in the present appeal

(i) Whether the prosecution has proved beyond reasonable doubt that the age of the prosecutrix at the time of the incident was below 16 years; and

(ii) Whether the accused is guilty of having raped the prosecutrix.

7. From the evidence on record, it is clear that the accused and the prosecutrix did have sexual intercourse. The prosecutrix has stated this fact in the Court. The prosecutrix was examined by the Doctor one day after the incident and as per Doctor Kamlesh Sharma (PW-5), who examined the prosecutrix, on local examination she had found that the margins of the hymen had small using and there was tenderness in the margins. According to her, these were signs indicative of fresh intercourse. The appellant one day after the incident left the village and was not traceable for almost three years.

Therefore, the version set up by the accused that the prosecutrix had sexual intercourse with some other person cannot be believed.

8. The question then arises as to whether the sexual intercourse was with the consent of the prosecutrix or not. If the prosecutrix at the time of the incident was below 16 years then the offence of rape would be deemed to have been committed even if she had consented. Therefore, it is essential to first deal with the question regarding her age. The prosecution has relied upon the statement of PW-3 Ashwani Kumar Panchayat Secretary who had brought the original Parivar Register in which the date of birth of the prosecutrix has been mentioned as 19.9.1987. On the basis of this entry he has issued the certificate Ext.PB. He in his cross examination admits that he had not brought the birth and death Register as there is no entry of the birth of the prosecutrix in the said Register. He further states that he cannot say on what basis the date of birth of the prosecutrix has been mentioned in the Parivar Register. He admits that there is no document with regard to the date of birth of the prosecutrix in the Register. In my opinion, the learned Sessions Judge was right in discarding the entry in the Parivar Register since there is no evidence to show on what basis the said entry was made.

9. The prosecutrix when she appeared in the witness box, did not state her age. She was not asked what was her date of birth by the prosecution. PW-2 Mahanti Devi mother of the prosecutrix states that she does not remember the date of birth or the year in which the prosecutrix was born. In her cross examination which was recorded on 1.7.2005 she states that she was married 22/23 years ago. This would mean that the marriage took place in 1982 or 1983. She has also stated that one year after the marriage a son was born and one year thereafter the prosecutrix was born. Therefore, even as

per the statement of the mother the age of the prosecutrix at the time of the incident would be more than 16 years. The prosecutrix was a student in the school. Even her birth certificate from the school has not been proved in the Court. As per the radiological report, the age of the prosecutrix is between 14 ½ and 17 years. The benefit of this also has to go to the appellant. Therefore, it can be said that the prosecution has miserably failed to prove that she was below 16 years at the time of the incident.

10. In ***Shyam Kumar vs. State of Himachal Pradesh {Latest HLJ 2005 (HP) 1035},*** a Single Judge of this Court held as follows:-

> "13. PW-6 has stated that he had "supplied" certificate Ext.PW-6/A and copy of family register Ext.PW-6/B which he claims to have been prepared correctly as per the original record. There is no dispute that under the Panchayati Raj Act, the Panchayat is required to maintain the records of births and deaths within its local limits. To maintain such records the Panchayat is mandated by law to maintain Birth and Death Register in prescribed form wherein all births and deaths within the local limits of the Panchayat have to be recorded along with the date of birth or death as the case may be. Thus, the primary evidence of date of birth of death of a person is the entry in the said register. Such entry or a certificate based on such entry will undoubtedly carry the presumption of truth. Any other record which may be maintained by the Panchayat, thus, cannot be primary evidence of the date of birth or death of a person. For similar reasons Ext.PW-6/B a copy of Pariwar Register is not the primary evidence of the date of birth of a person."

11. A Division Bench of this Court in ***State of Himachal Pradesh vs. Om Parkash & Anr. {Latest HLJ 2005 (HP)(DB) 179}*** held that the entry of date of birth in the Parivar Register is not relevant and cannot be relied upon to prove the age in the absence of the birth entry having been taken from birth and death Register. Therefore, no reliance can be placed on the entry in the Parivar Register. The finding of the trial Court that the prosecutrix is not proved to be below 16 years of age is upheld.

12. It is true that in a case of rape conviction can be maintained on the sole testimony of the victim herself. There is no need for corroboration but it is also equally well settled that if the testimony of the victim does not inspire confidence or is tainted then the Court must satisfy its judicial conscience. I proceed to examine the evidence in the light of the settled position of law.

13. The map Ext.PH prepared by the Investigating Officer (PW-6) and his statement shows that the spot where the prosecutrix was grazing the cattle was about 30 feet above the Waknaghat – Chhausa Road. As per the spot map she was taken 40 feet below the road where she was raped. It is also admitted case of both the parties that the prosecutrix and the accused were known to each other. They had studied in the school together. According to the prosecutrix, the accused came to the jungle and asked her to accompany him to the bushes. When she refused he picked her up, gagged her mouth, took her to the bushes and after laying her on the ground opened the ***Nara*** of her ***Salwar*** and then raped her. The prosecutrix is a young girl aged about 16 years. The accused is a few years older. There are no injuries on the prosecutrix. She admits that she suffered no injuries. Even the Doctor states that there were no signs of any injuries on the prosecutrix. It is true that presence of injuries is not a *sine qua none*

for the offence of rape to be proved. However, each case has to be examined on its own merits. The prosecutrix is a healthy young girl. It is alleged that she was forcibly carried almost 70 feet from the jungle above the road to the bushes on the other side of the road. It is not the case of the prosecutrix that prior to the incident the accused threatened her either verbally or by showing her some weapon. In case she had struggled there would have been some mark or injury on her body. Rape is alleged to have been committed in the bushes and photographs of the site of the alleged rape have been exhibited as Exts.A-1 to A-5. A perusal of these photographs shows that the area where the rape is alleged to have taken place is rocky and uneven. Some minor abrasions or bruises would have been there if the prosecutrix had struggled. One cannot also lose sight of the fact that the prosecutrix and the accused were well acquainted with each other. The prosecutrix has not even stated a word that she did not resist out of fear or nervousness.

14. The version of the prosecutrix that after she was raped, she collected her cattle and took them home and then reported the matter to her mother also does not inspire confidence. In case she had been raped and wanted to report the matter to her mother she would have immediately rushed home. Though delay in lodging the F.I.R. may not be fatal to the case the question which arises is why did not the grand father go in the evening itself to lodge the F.I.R. if in fact it was a case of rape. The prosecutrix did not reside in a remote area. Waknaghat is at a short distance from her village and from Waknaghat to Kandaghat buses are available all 24 hours. All these facts cast a doubt on the prosecution story and lend credence to the version of the accused that the case was lodged only after the accused did not agree to marry the prosecutrix.

15. There are serious discrepancies in the prosecution story. The allegation that the accused forcibly committed sexual intercourse with the prosecutrix cannot be readily believed. The prosecutrix and the accused belong to the same village. If rape had been committed and she had told her family members at night they would have definitely informed some other villagers. No such thing was done. It was only next morning that they all came to the Police Station at Kandaghat.

16. The case set up by the accused is that both the prosecutrix and he liked and wanted to get married to each other. The grand father of the prosecutrix also wanted that they get married. When his father did not agree to their getting married because the prosecutrix belonged to the Scheduled Caste the present case was lodged. This story cannot be totally discarded in view of the fact that the prosecutrix herself has admitted that they new each other fairly well and in view of the fact that no injury or any mark was found on any part of her body. It is therefore quite doubtful as to whether she was a consenting party or not. Her statement on oath on material facts does not inspire confidence and the benefit of doubt has to be given to the accused.

17. Keeping in view the aforesaid discussion, the appeal filed by the appellant is allowed and the judgment and sentence passed upon the appellant is set aside. The accused, who is presently in jail, is ordered to be set at liberty forthwith if not required to be detained in custody in any other case. Fine, if recovered, be refunded to him.

September 21, 2006. **(Deepak Gupta)**
(soni) **Judge.**